Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-1200

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.

Versus

THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS AND PETITION FOR A WRIT OF MANDAMUS

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SUPREME COURT OF THE UNITED STATES

NO.

OCTOBER TERM, 1977

THE AMERICAN ASSOCIATION OF COUNCILS
OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.

vs.

THE HONORABLE JUDGES OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

MOTION FOR LEAVE TO FILE A PETITION
FOR A WRIT OF MANDAMUS

The American Association of Councils of Medical Staffs of Private Hospitals, Inc. respectfully moves that it be granted leave to file the following petition for a writ of mandamus to require the Honorable Justices of the United States Fifth Circuit Court of Appeals to allow the American Association of Councils of Medical Staffs of Private Hospitals, Inc. the right to obtain a transcript of the oral argument which took place before the United States Court of Appeals for the Fifth Circuit on October 10, 1977 in the matter entitled, "The American Association of Councils of Medical Staffs of Private Hospitals, Inc. vs. David Mathews, Secretary of the United States Department of Health, Education and Welfare," No. 76-4156.

ROY F. GUSTE

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SUPREME COURT OF THE UNITED STATES

NO.

OCTOBER TERM, 1977

THE AMERICAN ASSOCIATION OF COUNCILS
OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.

vs.

THE HONORABLE JUDGES OF THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH
CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

The American Association of Councils of Medical Staffs of Private Hospitals, Inc. respectfully petitions this Court to issue a Writ of Mandamus to require the United States Court of Appeals for the Fifth Circuit to allow the American Association of Councils of Medical Staffs of Private Hospitals, Inc. the right to obtain a transcript of its tape recording of the oral argument which took place before the United States Court of Appeals for the Fifth Circuit on October 10, 1977 in the matter entitled, "The American Association of Councils of Medical Staffs of Private Hospitals, Inc. vs. David Mathews, Secretary of the United States Department of Health, Education and Welfare," No. 76-4156.

BACKGROUND OF THE CASE AND STATEMENT OF JURISDICTION

Petitioner, the American Association of Councils of

Medical Staffs of Private Hospitals, Inc. (hereafter "American CMS"), filed on October 1, 1975 in the United States District Court for the Eastern District of Louisiana a COMPLAINT FOR DECLARATORY JUDGMENT AND FOR INJUNCTIVE RELIEF against the Secretary of the United States Department of Health, Education and Welfare, Civil Action No. 35-3061.

The Complaint alleged that various provisions of a certain manual promulgated by the Department of Health, Education and Welfare, were unlawful in that they were: (a) inconsistent with the Social Security Act and exceeded the authority granted to the Secretary of the Department by the Act, (b) were inconsistent with certain federal regulations designed to implement the Social Security Act, (c) were promulgated by the Secretary in violation of the Administrative Procedure Act, and (d) violated the Constitution of the United States of America.

Jurisdiction was invoked in the District Court under 28 USC §1331.

On November 9, 1976, judgment was entered granting summary judgment in favor of the Department of Health, Education and Welfare and denying American CMS's motion for summary judgment. In support of its judgment, the district court held that it had jurisdiction under Section 10 of the Administrative Procedure Act, 5 USC § 701, et seq.; that there was no indication that the Secretary's policy was inconsistent with Congressional intent or exceeded his authority; that the manual provisions were merely interpretive rules and not issued in violation of the APA; and that plaintiff-appellant's constitutional allegations were without merit

since the disputed provisions had no mandatory impact on the appellant physicians' association and were reasonably related to a legitimate governmental purpose.

An appeal was lodged with the United States Court of Appeals for the Fifth Circuit, and oral argument was heard on October 10, 1977.

On October 20, 1977, petitioner moved the Court of Appeals for the Fifth Circuit for the right to obtain a transcript of the oral argument. This motion was denied on October 26, 1977.

Petitioner then filed a REQUEST FOR RECONSIDERATION OF DENIAL OF MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT. This motion was also denied on the basis of "the Court's undeviating policy of not furnishing transcripts of tape recording of an oral argument. The Court, for a good cause, has permitted counsel to employ stenographers to record the oral argument." This procedure, however, did not at that time appear in either the Federal Rules of Appellate Procedure, or in the Local Rules of the Fifth Circuit, or in the Internal Operating Procedures Manual for the Fifth Circuit:

Finally, on November 17, 1977, petitioner filed a MOTION FOR RECONSIDERATION *EN BANC* OF DENIAL OF REQUEST FOR RECONSIDERATION OF DENIAL OF MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT. This motion was likewise denied on November 30, 1977.

Accordingly, petitioner has exhausted all remedies avail-

able before the United States Court of Appeals for the Fifth Circuit.

The Supreme Court of the United States has jurisdiction to grant petitioner the relief requested by virtue of 28 USC §1651(a), which provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Under the facts as set forth above, petitioner has recourse to no court other than the Supreme Court of the United States. This petition is extraordinary and/or unique in that it involves a novel question of national importance unanswered by any other court. Mandamus is a proper means of determining whether or not the United States Court of Appeals for the Fifth Circuit may deny a litigant reasonable access to a tape recording of oral argument, particularly since, as described below, the policy of the Fifth Circuit in question here is at variance with the practice and procedure of the Supreme Court of the United States.

QUESTION PRESENTED FOR REVIEW

May the United States Court of Appeals for the Fifth Circuit, on the basis of an unpublished, unwritten policy, deny a litigant reasonable access, for the purpose of obtaining a transcript, to a tape recording of the oral argument of a case on appeal before that Court?

REASONS FOR GRANTING THE WRIT

Federal courts may prescribe rules for their internal operations. 28 USC §2071 states:

> "The Supreme Court and all courts established by an act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

However, the rules prescribed by the courts may not unduly circumscribe substantial rights of the litigants. *S. Stern and Company v. United States*, 331 F.2d 310 (1963), cert. denied 377 US 909, 84 S. Ct. 1169, 12 L. Ed. 2d 179 (1964); *United States v. Fairfield Gloves*, 558 F.2d 1023 (1977). Therefore, rules prescribed by the Court of Appeals must meet two criteria pertinent here. First, they must be consistent with rules of practice and procedure prescribed by the Supreme Court of the United States. Second, they may not unduly circumscribe rights of the litigant. The unwritten, unpublished policy in question here meets neither criterion.

As of October 10, 1977 it was the unwritten, unpublished policy of the Fifth Circuit to allow parties to petition the court, in advance, and for good cause shown, for permission to employ stenographers to record the oral argument. Had this rule been written or published, petitioner would have moved for permission to record the oral argument. This policy of the Fifth Circuit is in direct conflict with the practice and procedure of the United States Supreme Court.

Rule 36 of the Rules of the Supreme Court of the United

States provides in pertinent part as follows:

> "Rule 36. Printing of Appendices.
>
> 1. In the absence of a stipulation pursuant to paragraph 4 below, the appellant or petitioner shall. . . prepare and file forty copies of an appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant pleading, charge, finding or opinion; (3) the judgment, order or decision in question; and (4) *any other parts of the record to which the parties wish to direct the court's particular attention.*
>
> * * * *
>
> 6. At the beginning of the appendix there shall be inserted a list of the parts of the record which it contains in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins...*When matter contained in the reporter's transcript of proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter which is set out.* Omissions in the text of papers *or of the transcript* must be indicated by asterisks..."
> [Emphasis added].

Rule 36 of the Supreme Court Rules clearly contemplates that a party may wish to direct to the attention of the

Supreme Court all or a portion of a transcript of proceedings in lower courts, including the Court of Appeals. The policy of the Fifth Circuit subject of this petition frustrates this aspect of Rule 36 of the Supreme Court.

Further, the United States Supreme Court allows litigants to obtain transcript of oral argument before it by paying a designated fee to a reporting company under contract with the Supreme Court. This practice has been published by R.L. Stern and E. Gressman, *Supreme Court Practice*, (4th ed., 1969), and is described therein at pages 488-489, as follows:

> "Transcripts. All oral arguments are transcribed exclusively by a private reporting firm under contract with the Court. Counsel is not permitted to bring in his own reporter or recording device. If a transcription is desired, any party or amicus may purchase it directly from the official reporting firm; others may purchase it from the Bureau of National Affairs, Inc., in Washington, D.C., the publisher of this book. The transcript is usually available about five (5) days after oral argument, although it can be secured sooner on the payment of a premium rate. The transcripts, moreover, are available for inspection in the Library of the Court...In addition, recordings of the oral arguments, first made for the sole use of the Court itself, may be heard at the National Archives, to which they are transferred a year or so subsequent to the arguments."

A footnote to that description further stated:

"This arrangement commenced in October of 1968, when the Court entered into a one-year contract with the Alderson Reporting Co., Inc., of Washington, D.C. The contract provided that the transcript 'shall include everything spoken in argument, by Court, counsel, or others, and nothing shall be omitted from the transcript unless the Chief Justice or Presiding Justice so directs.' But 'the names of Justices asking questions shall not be recorded or transcribed; questions shall be indicated by the letter "Q" ' and exhibits used in connection with argument and not part of the record below 'need not be copied into the transcript...unless the Chief Justice or Presiding Justice directs otherwise.' "

In denying petitioner access to obtain a transcript of an existing cassette recording, the Fifth Circuit is withhholding a vital part of the overall record that will be an important tool in preparing for any subsequent appeals. Furthermore, since the outcome of the appeal in question will affect physicians and their patients on a nationwide basis, petitioner, a national organization or physicians with approximately 41,000 privately-practicing members in 32 states, wishes to preserve a complete historical record of the appeal proceedings.

The unreasonableness of the position of the Fifth Circuit in this matter is particularly noticeable when viewed in light of the manner in which petitioner requested access to the cassette recordings. In each of its three motions before the Fifth Circuit, petitioner expressed its willingness to acquire a transcript by whatever means were allowed, with a view

toward minimizing, if not eliminating, administrative inconvenience and expense for the Fifth Circuit. Copies of these motions are attached and incoporated herein in their entirety as Addendum, pages A-1 through A-17.

The unreasonableness of the policy of the Fifth Circuit regarding transcripts is further apparent when viewed in comparison with the policies of several other circuits.

The policy of the Eighth Circuit, as set forth in a letter from the Clerk of Court dated February 17, 1978, a copy of which is attached hereto, states in pertinent part:

> "It is the policy of the Court to permit attorneys to transcribe, in the Clerk's office, the recordings of oral arguments. Parties are not permitted to remove the tapes from the Clerk's office, nor to re-record oral arguments from the original tapes."

The Ninth Circuit allows attorneys of record to listen to the tapes of oral argument. Attorneys must, however, provide their own equipment on which to listen to the tape. Attached hereto is a letter from the Clerk of Court, Ninth Circuit, setting forth its policy.

The Second Circuit published a "NOTICE TO THE BAR" informing counsel that they must apply to the Clerk before oral argument in order to employ a court reporter to record the proceeding. Attached hereto is a copy of the "NOTICE TO THE BAR" supplied to petitioner by the Clerk of Court of the Second Circuit.

The policies of the Second, Eighth and Ninth Circuits thus

serve the dual purpose of accommodating the administrative needs of the court while preserving the rights of litigants to a complete historical record of appellate proceedings. The policy of the Fifth Circuit, however, with no prior notice to litigants or their attorneys, deprives litigants access to a record of an integral part of the appellate process.

CONCLUSION

By reason of all the foregoing, the policy of the Fifth Circuit, subject of this petition, violates the substantial rights of petitioner, is inconsistent with the practice and procedure of the Supreme Court of the United States, and is inconsistent with Rule 36 of the Rules of the Supreme Court of the United States.

WHEREFORE, the American Association of Councils of Medical Staffs of Private Hospitals, Inc. respectfully requests that the Supreme Court of the United States order the Honorable Judges of the United States Court of Appeals for the Fifth Circuit to allow petitioner reasonable access to its tape recording, for the purpose of obtaining a transcript of oral argument heard before the United States Court of Appeals for the Fifth Circuit on October 10, 1977 in the matter entitled, "The American Association of Councils of Medical Staffs of Private Hospitals, Inc. vs. David Mathews, Secretary of the United States Department of Health, Education and Welfare," No.76-4156.

ROY F. GUSTE

WILLIAM J. GUSTE III

and

JOHN C. SAUNDERS, JR.

Guste, Barnett & Shushan
Attorneys for Petitioner
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Telephone: (504) 529-4141

VERIFICATION

WILLIAM J. GUSTE III, being duly sworn, deposes that he is of counsel for the petitioner; that he has read the foregoing petition and that to the best of his information and belief the facts therein stated as true.

WILLIAM J. GUSTE III

SWORN TO AND SUBSCRIBED
before me this 22nd
day of February, 1978.

NOTARY PUBLIC

PROOF OF SERVICE

I, WILLIAM J. GUSTE III, one of the attorneys for The American Association of Councils of Medical Staffs of Private Hospitals, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 23rd day of February, 1978, I served copies of the foregoing *Motion for Leave to File a Petition for a Writ of Mandamus* and *Petition for a Writ of Mandamus* on the Honorable Judges of the Court of Appeals for the Fifth Circuit.

WILLIAM J. GUSTE III

WILLIAM J. GUSTE III
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APPENDIX TO PETITION FOR WRIT OF MANDAMUS

APPENDIX A

MOTION OF PLAINTIFF FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed: Oct. 20, 1977

THE AMERICAN ASSOCIATION OF
COUNCILS OF MEDICAL STAFFS
OF PRIVATE HOSPITALS, INC.,
Plaintiff-Appellant,

versus NO. 76-4156

DAVID MATHEWS, SECRETARY OF
HEALTH, EDUCATION AND WELFARE
Defendant-Appellee.

MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

Now into Court, through undersigned counsel, comes plaintiff, The American Association of Councils of Medical Staffs of Private Hospitals, Inc., and with respect moves this Court for a leave to obtain transcript of oral argument before the United States Court of Appeals for the Fifth Circuit in the above matter for the following reasons:

I.

Oral argument in this matter was held on October 10, 1977.

II.

Plaintiff-Appellant is a national organization of physicians with approximately 41,000 privately practicing members in thirty-two states, each of whom is affected by the outcome of this matter; for purposes of preserving a complete historical record of the proceedings which will ultimately lead to a judgment in a lawsuit of national importance, plaintiff respectfully prays this Court for leave to obtain a typewritten transcript of the October 10, 1977 proceedings which were recorded by tape.

III.

Plaintiff-Appellant is willing to reimburse the Court for whatever expenses are incurred by the Court in connection with preparing the transcript, or pay to the Court whatever charges the Court wishes to make in this regard; or plaintiff is prepared to supply its own typist under the Court's supervision; or plaintiff will respectfully abide by any method the Court wishes to order for the preparation of the said transcript.

WHEREFORE, plaintiff-Appellant prays that leave be granted to obtain a transcript of the October 10, 1977 oral argument in these proceedings, in whatever manner may be ordered by this Honorable Court.

Respectfully submitted,

WILLIAM J. GUSTE,III
Counsel for Plaintiff-Appellant
1624 First National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Phone:(504) 529-4141

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to counsel for defendant-appellee, Ford J. Dieth, Assistant United States Attorney, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130, this day of October, 1977.

WILLIAM J. GUSTE, III

APPENDIX B

ORDER DENYING APPELLANT'S MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

Filed: Oct 26, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76 - 4156

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.
Plaintiff-Appellant

versus

JOSEPH A. CALIFANO, JR., Secretary of U.S. Department of Health, Education, and Welfare,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

ORDER:

IT IS ORDERED that appellant's motion for leave to obtain transcript of oral argument is denied.

S/ JOHN MINOR WISDOM
UNITED STATES CIRCUIT
JUDGE

APPENDIX C

REQUEST FOR RECONSIDERATION OF DENIAL OF MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

Filed: Oct 31, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.
Plaintiff-Appellant

Versus NO. 76 - 4156

DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE
Defendant-Appellee.

REQUEST FOR RECONSIDERATION OF DENIAL OF MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

Now into Court, through undersigned counsel, comes plaintiff-appellant, The American Association of Councils of Medical Staffs of Private Hospitals, Inc., and with respect requests this Honorable Court to reconsider its denial of plaintiff-appellant's Motion for Leave to Obtain Transcript of Oral Argument in the above matter for the following reasons:

I.

On October 20, 1977 plaintiff-appellant submitted a Motion for Leave to Obtain a Transcript of the Oral Argument in this matter held on October 10, 1977; by Order of the Court dated October 26, 1977, plaintiff-appellant's Motion was denied.

II.

Plaintiff-appellant is aware of the enormous case load and administrative work load of the United States Court of Appeals for the Fifth Circuit, its Clerk's Office and other administrative offices; plaintiff-appellant is therefore willing to abide by any method the Court wishes to order for the preparation of the said transcript, including but not limited to the following:

(a) Appointment of a certified court reporter to prepare the transcript at plaintiff-appellant's expense.

(b) Reimburse the United States Court of Appeals for the Fifth Circuit for any expenses the Fifth Circuit may incur in supplying plaintiff-appellant with a transcript prepared by the Fifth Circuit's own typist.

(c) Plaintiff-appellant would supply its own typist under the Fifth Circuit's supervision.

(d) Plaintiff-appellant will abide by whatever method the Court wishes to order for the preparation of the requested transcript.

IV.

Plaintiff-appellant is willing to reimburse the Court for whatever incidental expenses are incurred by the Court in connection with preparing the transcript.

V.

The outcome of the appeal in question will affect physicians and their patients on a nation-wide basis; plaintiff-appellant is a national organization of physicians with approximately 41,000 privately practicing members in thirty-two states, each of whom is affected by the outcome of this matter; plaintiff-appellant urgently wishes to preserve a complete historical record of the proceedings which will lead to a judgment in a lawsuit of national importance; plaintiff-appellant was not allowed to make its own recording of the October 10th oral argument.

WHEREFORE, plaintiff-appellant, The American Association of Councils of Medical Staffs of Private Hospitals, Inc., prays that its request for reconsideration of this Honorable Court's denial of its Motion for Leave to Obtain a Transcript of the Oral Argument held on October 10, 1977 be granted.

Respectfully submitted,

s/ William J. Guste, III
WILLIAM J. GUSTE, III
Counsel for Plaintiff-Appellant
1624 First National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Phone: (504) 529-4141

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to counsel for defendant-appellee, Ford J. Dieth, Assistant United States Attorney, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana 70130, this 31st day of October, 1977.

s/ William J. Guste, III
WILLIAM J. GUSTE, III

APPENDIX D

ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER OF OCTOBER 26, 1977

Filed: Nov. 7, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76 - 4156

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.,
Plaintiff-Appellant

versus

JOSEPH A. CALIFANO, JR., Secretary of U.S. Department of Health, Education, and Welfare,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

ORDER:

IT IS ORDERED that appellant's motion for reconsideration of the Court's order of October 26, 1977 denying appellant's motion for leave to obtain transcript of oral argument is DENIED, in view of the Court's undeviating policy of not furnishing transcripts of the tape recording of an oral

argument. The Court, for good cause, has permitted counsel to employ stenographers to record the oral argument.

s/ JOHN MINOR WISDOM
UNITED STATES CIRCUIT
JUDGE

APPENDIX E

MOTION FOR RECONSIDERATION *EN BANC* OF DENIAL OF RECONSIDERATION OF MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

Filed: Nov. 17, 1977

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76 - 4156

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.,
Plaintiff-Appellant

v.

DAVID MATHEWS, Secretary of Health, Education and Welfare,
Defendant-Appellee

MOTION FOR RECONSIDERATION *EN BANC* OF DENIAL OF RECONSIDERATION OF MOTION FOR LEAVE TO OBTAIN TRANSCRIPT OF ORAL ARGUMENT

WILLIAM J. GUSTE III
Attorney for Plaintiff-Appellant
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REQUIRED STATEMENT FOR HEARING EN BANC

I express a belief, based on a reasoned and studied professional judgment, that this motion involves a question of exceptional importance, namely the question of whether a litigant can be denied, on the basis of an unwritten rule or custom of the Court, access to a tape of the oral argument of counsel.

s/ William J. Guste III
WILLIAM J. GUSTE III
Guste, Barnett & Shushan
Attorneys for The American
Association of Councils of Medical Staffs of Private Hospitals,
Inc.
1624 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

NOW INTO COURT, through undersigned counsel, comes Plaintiff-Appellant, The American Association of Councils of Medical Staffs of Private Hospitals,Inc., and with respect requests this Honorable Court to reconsider *en banc* the denial of Plaintiff-Appellant's Motion for Leave to Obtain Transcript of Oral Argument in the above matter for the following reasons:

1.

Oral argument was held in this matter on October 10, 1977; on that date, there was present in the Court an employee of the United States Court of Appeals for the Fifth Circuit who made a tape recording of oral argument.

2.

Subsequent to oral argument, Plaintiff-Appellant requested a transcript of the proceedings and was informed that no transcript could be made but that counsel could make a motion for leave to obtain a transcript.

3.

On October 20, 1977 counsel for Plaintiff-Appellant entered such a motion; the motion was denied by Order of October 26, 1977.

4.

On October 31, 1977 Plaintiff-Appellant entered a Request for Reconsideration of the denial of its Motion for Leave to Obtain a Transcript of Oral Argument; by Order of

November 7, 1977, the Request for Reconsideration was denied, "in view of the Court's undeviating policy of not furnishing transcripts of the tape recording of an oral argument. The Court, for good cause, has permitted counsel to employ stenographers to record the oral argument."

5.

The Local Rules of the United States Court of Appeals for the Fifth Circuit supplement the Federal Rules of Appellate Procedure; neither the Local Rules nor the Federal Rules of Appellate Procedure, however, contain any reference to the policy of the Court subject of this motion.

6.

Because of the absence of any reference to the Court's policy, either in the Federal Rules of Appellate Procedure and/or in the Local Rules, Plaintiff-Appellant was not aware that it would have to apply in advance of oral argument for leave to employ a stenographer of its own to record the oral argument; had this policy been reduced to a written local rule, or appeared in the Federal Rules of Appellate Procedure, Plaintiff-Appellant would have so applied for leave.

7.

The outcome of the appeal in question will affect physicians and their patients on a nationwide basis; Plaintiff-Appellant is a national organization of physicians with approximately 41,000 privately practicing members in 32 states, each of whom is affected by the outcome of this matter; Plaintiff-Appellant therefore wishes to preserve

a complete historical record of the proceedings which will ultimately lead to a judgment in a lawsuit of national importance; Plaintiff-Appellant was not allowed to make its own tape recording of the October 10th oral argument.

8.

The statements of counsel for both Plaintiff-Appellant and Defendant-Appellee at oral argument, and in particular the statements and questions rendered by the Honorable Presiding Judges, constitute integral portions of the complete historical record of this proceeding; without a written record of the statements of counsel and the statements and questions of the Presiding Judges, the historical record of proceedings which will lead to a judgment in a lawsuit of national importance will be incomplete.

9.

In its original Motion for Leave to Obtain Transcript of Oral Argument, and in its Request for Reconsideration, Plaintiff-Appellant acknowledged the enormous caseload and administrative workload of the United States Court of Appeals for the Fifth Circuit, its Clerk's Office, and other administrative officers, and stated clearly that it was willing to abide by any method the Court wishes to order for the preparation of the transcript subject of this request; Plaintiff-Appellant reiterates the allegations of its original Motion and its Request for Reconsideration in this regard and urgently requests this Court to reconsider its policy in view of the particular facts and circumstances of this particular case.

WHEREFORE, Plaintiff-Appellant, The American Asso-

ciation of Councils of Medical Staffs of Private Hospitals, Inc., prays that its Request for Reconsideration *En Banc* of this Honorable Court's denial of its Request for Reconsideration of Denial of Motion for Leave to Obtain Transcript of Oral Argument be granted.

Respectfully submitted,

s/ William J. Guste, III
WILLIAM J. GUSTE III
Guste, Barnett & Shushan
Counsel for Plaintiff-Appellant
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Telephone: (504) 529-4141

CERTIFICATE

I hereby certify that a copy of the above and foregoing Request for Reconsideration has been mailed to counsel for Defendant-Appellee, Ford J. Deith, Assistant United States Attorney, Hale Boggs Federal Building, 500 Camp Street, New Orleans, Louisiana, 70130, by placing copy of same in the United States mail, postage prepaid and properly addressed, on this the 17th day of November, 1977.

s/ William J. Guste III
WILLIAM J. GUSTE, III

APPENDIX F

OPINION OF CIRCUIT COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed: Nov. 30, 1977

No. 76 - 4156

THE AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC.,
Plaintiff-Appellant

versus

JOSEPH A. CALIFANO, JR., Secretary of U.S. Department of Health, Education and Welfare,
Defendant-Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

Before WISDOM, GEWIN and AINSWORTH, Circuit Judges.

PER CURIAM:

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on motion for reconsideration en banc of denial of reconsideration of motion for leave to obtain transcript of oral argument, the motion is DENIED.

FOR THE COURT:
S/ ROBERT A. AINSWORTH, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX G

UNITED STATES COURT OF APPEALS
For the Eighth Circuit
St. Louis, Mo. 63101

February 17, 1978

Mr. William I. Guste, III
c/o Guste, Barnett & Shushan
1624 FNBC Building
New Orleans, Louisiana 70112

Dear Mr. Guste:

This is in response to your question regarding the availability of transcripts of oral arguments before this Court. It is the policy of the Court to permit attorneys to transcribe, in the Clerk's office, the recordings of oral arguments. Parties are not permitted to remove the tapes from the Clerk's office, nor to re-record oral arguments from the original tapes.

We hope this explanation is satisfactory.

Very truly yours,

Robert C. Tucker, Clerk

By: s/ Ann Keller
Ann Keller, Chief Deputy

AK:slk

APPENDIX H

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

February 16, 1978

William J. Guste, III, Esquire
GUSTE, BARNETT & SHUSHAN
Attorneys at Law
1624 FNBC Bldg.
New Orleans, Louisiana 70112

Dear Mr. Guste:

Pursuant to our telephone conversation this date, I am informing you of the U.S. Court of Appeals, for the Ninth Circuit, policy on tapes of oral argument. Tapes for oral argument are available to the attorneys of record of the appeal which is requested to be heard. Furthermore, the attorney must provide his own equipment on which he may listen to the tape.

This information may vary a little from that which was given by telephone this date, as I have further researched the court's policy on tapes of oral argument. The above is the accurate information that you desire.

Sincerely yours,

EMIL E. MELFI, JR.,
Clerk of Court

by: s/ Bruce Cutler
Bruce Cutler, Deputy Clerk

APPENDIX I

NOTICE TO THE BAR

As you know the courtoom tape recording system has been installed essentially for the convenience of the judges of the court and their law clerks. The Clerk's office is not geared to provide attorneys with duplicate tapes or typewritten transcriptions of the proceedings.

Therefore, the attorneys who require a transcript of oral argument should make arrangements to employ a court reporter to report the proceeding in advance of the argument. The Clerk will handle applications for leave to permit an official court reporter to take minutes of arguments.

Counsel should anticipate their need for a transcript of the argument and apply to the Clerk before the date of argument. Motions for duplicate tapes or for typewritten transcriptions of the proceedings will not be entertained as they shall not be accepted for filing.

A. Daniel Fusaro
Clerk

Supreme Court, U. S.
FILED
APR 18 1978
MICHAEL RODAK, JR., CLERK

No. 77-1200

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC., PETITIONER

v.

JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF MANDAMUS

MEMORANDUM FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1200

AMERICAN ASSOCIATION OF COUNCILS OF MEDICAL STAFFS OF PRIVATE HOSPITALS, INC., PETITIONER

v.

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MEMORANDUM FOR THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE IN OPPOSITION

The Secretary of Health, Education, and Welfare is a party to the proceeding out of which this controversy arose. Although the Secretary took no position in the court of appeals on petitioner's motion for a transcript of the oral argument in that court, petitioner has served the Secretary with the petition for mandamus. The Secretary is therefore a respondent here, under Rule 31(3) of the Rules of this Court.[1]

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[1]We have informed the judges of the court of appeals of the position taken here, and we have advised them that if they wish to state their position separately, they may respond to the petition on their own behalf.

1. Petitioner, the appellant in *American Association of Councils of Medical Staffs of Private Hospitals, Inc.* v. *Califano,* C.A. 5, No. 76-4156, argued October 10, 1977, sought to obtain a transcript of the oral argument in that case in the court of appeals. That motion was denied (Pet. App. A-4). On a motion for reconsideration, the court stated that it was the court's "undeviating policy [not to furnish] transcripts of the tape recording of an oral argument" (Pet. App. A-9 to A-10). The court added that for good cause it has permitted counsel to employ stenographers to record the oral argument (Pet. App. A-10). After denial of a petition for rehearing *en banc* (Pet. App. A-17), petitioner filed this motion for leave to file and petition for a writ of mandamus.

2. We do not believe that mandamus is appropriate here. This Court ordinarily declines to exercise its authority to issue extraordinary writs when other adequate remedies are available. *Ex parte Peru,* 318 U.S. 578, 584-585. In *Ex parte Fahey,* 332 U.S. 258, 259-260, this Court explained some of the reasons that petitions for extraordinary writs from this Court are disfavored:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes.

The present case is not such an extraordinary cause. A petition for a writ of certiorari would be the appropriate means for petitioner to present its claim to this Court.[2] Petitioner contends that it seeks to obtain a transcript of the oral argument in the court of appeals in order to aid in preparing for any subsequent appeals and in order to "preserve a complete historical record of the appeal proceedings" (Pet. 10). Petitioner does not suggest that the lack of a transcript of the oral argument will prejudice it in this litigation or that there is any disputed issue about what took place at oral argument that might create a particularized need for reference to the court's tape recording of the oral argument.

Petitioner's objection, moreover, is primarily that the Fifth Circuit's policy of not permitting access to tape recordings of oral argument was unpublished, and that petitioner was therefore not put on notice that it should request permission in advance to have the argument transcribed by a private stenographer.[3] But in light of the practice of courts such as the Second Circuit (see Pet.

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[2]Review of proceedings in the court of appeals is not limited to review of final judgments. See 28 U.S.C. 1254(1). But petitioner's motion for reconsideration of the order declining access was denied on November 7, 1977 (Pet. App. A-9), and the motion for leave to file a petition for a writ of mandamus was not filed until February 24, 1978. If the motion were treated as a petition for a writ of certiorari, it would be jurisdictionally out of time under 28 U.S.C. 2101(c). Petitioners' suggestion of rehearing *en banc* did not toll the time within which to file a petition, because it was a successive application for reconsideration. It may be, however, that petitioner will have another 90 days within which to file a petition once a final decision has been entered.

[3]Petitioner does not contend that the Fifth Circuit's policy is unconstitutional or that it violates any statutory or common-law principles requiring that the recordings be made available, claims that are now pending before this Court in a somewhat different context in *Nixon* v. *Warner Communications, Inc.,* No. 76-944, argued November 8, 1977.

App. A-20), which also require attorneys who wish transcripts of oral arguments to make arrangements in advance, petitioner should have made inquiry regarding the Fifth Circuit's practice before oral argument, rather than assuming that the court's tape recordings would be made freely available afterwards.

We believe that it would be improper for the Fifth Circuit to apply its rule against making tape recordings or transcripts of oral arguments available in a case in which a particularized need for access to the recording were shown—if, for example, there arose a dispute about whether a particular representation or concession had been made at oral argument. Moreover, we believe that it would be preferable for parties to have access to transcripts on request, without making any showing of need. Transcripts of arguments in this Court are available, and the court of appeals has not indicated why it follows a different practice. But however that may be, in this case, because of petitioner's failure to inquire in advance about using a private stenographer to record the argument, and because there is no claim of specific prejudice, there is no sufficient reason for this Court to issue an extraodinary writ.

It is therefore respectfully submitted that the motion for leave to file a petition for a writ of mandamus should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04